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LOW SOO SONG

v.

PP

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FEDERAL COURT, PUTRAJAYA
RICHARD MALANJUM CJ (SABAH & SARAWAK)
NIK HASHIM FCJ
HASHIM YUSOFF FCJ
[CRIMINAL APPEAL NO: 05-57-2007 (P)]

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19 FEBRUARY 2009

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CRIMINAL LAW: *Firearms (Increased Penalties) Act 1971 - Section 3 - Discharging a firearm in the commission of a scheduled offence - Ingredients of offence - Whether imperative that accused personally commit the scheduled offence - Firearms (Increased Penalties) Act 1971, s. 3*

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CRIMINAL LAW: *Penal Code - Section 34 - Common intention - Scope and purpose of s. 34 - Penal Code, s. 34*

CRIMINAL PROCEDURE: *Sentence - Voluntarily causing grievous hurt - Grievous hurt caused by discharge of firearm - Assessment of sentence*

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WORDS & PHRASES: *‘any person who at the time of his committing ... a scheduled offence discharges a firearm’ - Firearms (Increased Penalties) Act 1971, s. 3*

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The appellant was convicted and sentenced to death by the High Court for discharging a firearm in the commission of the scheduled offence of robbery, pursuant to s. 3 of the Firearms (Increased Penalties) Act 1971 (‘FIPA’). The facts revealed that it was the appellant’s still at large accomplice who had robbed victim PW3 of her gold jewellery and ransacked her home whereas it was the appellant who had shot and injured the daughter of the victim (PW4). The appellant’s appeal to the Court of Appeal was dismissed and the appellant appealed to the Federal Court. In the Federal Court, the appellant’s counsel submitted *inter alia* that the courts below had erred in linking the act of robbery to the appellant since the appellant was not charged for the offence in furtherance of a common intention under s. 34 of the Penal Code.

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Held (allowing the appeal but substituting the conviction under s. 3 of FIPA with a conviction for voluntarily causing grievous hurt under s. 326 of the Penal Code)

Per Nik Hashim FCJ delivering the judgment of the court:

- (1) The prosecution had to prove the following ingredients against the appellant under s. 3 of FIPA: (i) there was a robbery committed by the appellant; (ii) the appellant at the time of committing the robbery had discharged a firearm; and (iii) the appellant had intended to cause death or hurt to some person, even if no hurt was caused by the discharge of the firearm. The words 'any person who at the time of his committing ... a scheduled offence discharges a firearm' clearly required the prosecution to prove that it was the appellant who had discharged a firearm whilst committing the offence. *Public Prosecutor v. Ong Poh Cheng* (foll). (paras 12 & 13)
- (2) In the instant case, the appellant was not charged for committing the offence in furtherance of a common intention under s. 34 of the Penal Code, with his still at large accomplice. It was important in the instant case for the prosecution to have framed the charge with reference to s. 34 of the Penal Code. Section 34 is intended to make a person liable for the action of an offence not committed by him but by another person with whom he shared the common intention. By invoking s. 34, the appellant would be equally liable for the act of robbery in the same manner as if the act was done by him alone, notwithstanding that it was his still at large accomplice who actually committed the offence. *Lee Kwai Heong & Anor v. Public Prosecutor* (refd); *Sabarudin Non v. PP & Other Appeals* (foll); *Hari Ram v. State of Uttar Pradesh* (SC) (foll). (paras 14 & 15)
- (3) From the evidence, there was nothing to suggest that the appellant had taken anything from PW3 or from her house. The High Court's finding of fact, subsequently affirmed by the Court of Appeal, showed that the robbery was not committed by the appellant. Hence, the first two vital ingredients of the offence, that the robbery was committed by the appellant and that the appellant at the time of his committing the robbery discharged a firearm, were not proved against the appellant. The charge against the appellant thus could not be sustained. (para 16)

- A (4) In the instant case, there was ample evidence to show that the appellant voluntarily caused hurt to PW4 with a firearm – an instrument for shooting and that this hurt had clearly endangered the life of PW4. Thus by reference to s. 167 of the CPC, the appellant ought to be convicted of an offence under s. 326 of the Penal Code for voluntarily causing grievous hurt to PW4. An appropriate sentence after considering mitigation was 18 years' imprisonment from the date of arrest. (para 17)
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C ***Bahasa Malaysia Translation Of Headnotes***

- Perayu disabit oleh Mahkamah Tinggi di bawah s. 3 Akta Senjata Api (Penalti Lebih Berat) 1971 ('FIPA') kerana kesalahan melepaskan tembakan daripada suatu senjata api ketika melakukan kesalahan berjadual iaitu merompak dan telah dijatuhkan hukuman mati. Fakta menunjukkan bahawa, yang merompak barang-barang kemas mangsa SP3 dan mengeledah rumah SP3 adalah rakan sejenayah perayu yang masih ghaib, sementara perayu adalah yang menembak anak perempuan SP3 ('SP4') dan mencederakannya.
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- E Rayuan perayu ke Mahkamah Rayuan telah ditolak dan perayu merayu ke Mahkamah Persekutuan. Di Mahkamah Persekutuan, peguam perayu antara lain berhujah bahawa mahkamah-mahkamah di bawah khilaf dalam mengaitkan perbuatan merompak dengan perayu, oleh kerana perayu tidak didakwa dengan pertuduhan melakukan kesalahan dengan niat bersama di bawah s. 34 Kanun Keseksaan.
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Diputuskan (membenarkan rayuan tetapi mengganti sabitan di bawah s. 3 FIPA dengan sabitan mendatangkan kecederaan parah di bawah s. 326 Kanun Keseksaan)

- G **Oleh Nik Hashim HMP menyampaikan penghakiman mahkamah:**

- (1) Di bawah s. 3 FIPA pendakwaan perlu membuktikan ingredien-ingredien berikut terhadap perayu: (i) terdapat rompakan yang dilakukan perayu; (ii) perayu semasa melakukan rompakan telah melepaskan tembakan; dan (iii) perayu berniat untuk menyebabkan kematian atau kecederaan ke atas seseorang, walaupun tiada kecederaan sebenar berlaku apabila tembakan dilepaskan. Perkataan 'mana-mana orang yang semasa melakukan ... kesalahan berjadual melepaskan tembakan' jelas menuntut pendakwaan supaya membuktikan
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bahawa perayu adalah orang yang melepaskan tembakan semasa melakukan kesalahan. *Public Prosecutor v. Ong Poh Cheng* (diikuti).

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- (2) Dalam kes semasa, perayu tidak dituduh melakukan kesalahan dengan niat bersama di bawah s. 34 Kanun Keseksaan, bersama-sama dengan rakan sejenayah yang masih ghaib. Adalah penting dalam kes ini bahawa pendakwaan merangka pertuduhan dengan merujuk kepada s. 34 Kanun Keseksaan. Seksyen 34 dimaksud untuk menjadikan seseorang bertanggung atas perbuatan suatu kesalahan yang tidak dilakukannya tetapi dilakukan oleh seorang lain dengan siapa beliau berkongsi niat yang sama. Dengan menggunakan s. 34, perayu akan sama-sama bertanggung atas perbuatan merompak seolah-olah perbuatan itu dilakukan oleh dirinya seorang, walaupun yang melakukannya adalah rakan sejenayah beliau yang masih hilang. *Lee Kwai Heong & Anor v. Public Prosecutor* (dirujuk); *Sabarudin Non & Ors v. Public Prosecutor* (diikuti); *Hari Ram v. State of Uttar Pradesh* (diikuti)

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- (3) Berdasarkan keterangan, tiada apapun yang menunjukkan bahawa perayu mengambil apa-apa dari SP3 atau dari rumahnya. Dapatan fakta Mahkamah Tinggi, yang kemudian disahkan oleh Mahkamah Rayuan, menunjukkan bahawa rompakan tidak dilakukan oleh perayu. Oleh itu, dua ingredien pertama yang penting tersebut, iaitu bahawa rompakan dilakukan oleh perayu dan bahawa perayu semasa melakukan rompakan telah melepaskan tembakan, tidak dibuktikan terhadap perayu. Ianya mengikut bahawa pertuduhan terhadap perayu tidak boleh dipertahankan.

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- (4) Dalam kes semasa, terdapat keterangan kukuh yang menunjukkan bahawa perayu telah dengan sengaja mendatangkan kecederaan kepada SP4 dengan menggunakan senjata api – suatu alat untuk menembak dan bahawa kecederaan ini telah membahayakan nyawa SP4. Oleh itu, dengan merujuk kepada s. 167 KPJ, perayu harus disabitkan dengan kesalahan di bawah s. 326 Kanun Keseksaan kerana dengan sengaja menyebabkan kecederaan parah kepada SP4. Hukuman wajar setelah mengambilkira mitigasi adalah 18 tahun penjara dari tarikh tangkap.

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A Case(s) referred to:

Lee Kwai Heong & Anor v. PP [2006] 1 CLJ 1043 CA (*refd*)

Low Soo Song v. PP [2008] 1 CLJ 433 CA (*refd*)

Ong Poh Cheng v. PP [1998] 4 CLJ 1 CA (*refd*)

PP v. Ong Poh Cheng [1996] 1 CLJ 501 HC (*refd*)

B Sabarudin Non v. PP & Other Appeals [2005] 1 CLJ 466 CA (*fol*)**Legislation referred to:**

Criminal Procedure Code, s. 167

Firearms (Increased Penalties) Act 1971, s. 3

Penal Code, ss. 34, 326

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For the appellant - Amer Hamzah Arshad; M/s Zain & Co

For the respondent/PP - Nurulhuda Nuraini Mohd Noor DPP

[Appeal from Court of Appeal; Criminal Appeal No: P-05-01-2004]

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[Editor's note: For the Court of Appeal judgment, please see Low Soo Song v. PP [2008] 1 CLJ 433.]

Reported by Andrew Christopher Simon

E**JUDGMENT****Nik Hashim FCJ:****Background****F**

[1] The appellant was convicted and sentenced to death by the High Court for discharging a firearm in the commission of a scheduled offence of robbery on 7 March 2001 at 8.30am at a house No. 6161 Jalan Dua Lahar Bubu, Bertam, Kepala Batas, Pulau Pinang in contravention of s. 3 of the Firearms (Increased

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Penalties) Act 1971 (the Act). The charge on which the appellant was convicted was as follows:

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Bahawa kamu pada 7 Mac 2001, jam lebih kurang 8.30 pagi, di No. 6161, Jalan Dua Lahar Bubu, Bertam Estate, Kepala Batas, dalam daerah Seberang Perai Utara, dalam Negeri Pulau Pinang telah melakukan rompakan di rumah berkenaan iaitu satu kesalahan berjadual, dan semasa melakukan rompakan tersebut kamu telah melepaskan tembakan dari suatu senjata api ke arah seorang perempuan Cina bernama Ooi Hua Siew K/p: 790906-07-5316 dengan niat hendak menyebabkan kematian atau kecederaan

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ke atas perempuan itu, dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 3 Akta Senjata Api (Penalti Lebih Berat) 1971 (Akta 37) dan boleh dihukum di bawah seksyen yang sama Akta tersebut.

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[2] The appellant's appeal against the conviction and sentence was dismissed by the Court of Appeal (Gopal Sri Ram JCA, Mohd Ghazali Yusoff JCA, Hasan Lah JCA), (see [2008] 1 CLJ 433). The appellant further appealed to us. On 4 November 2008 we unanimously allowed the appeal but substituted the conviction for the offence with that of voluntarily causing grievous hurt by a dangerous weapon under s. 326 of the Penal Code (the PC) and sentenced the appellant to 18 years imprisonment with effect from the date of his arrest.

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[3] On 7 March 2001 at about 8.10am a housewife (PW3) heard a car honk at her house gate. PW3 looked from inside the house and saw two persons wearing spectacles and caps. One of them removed his glasses and gave his name as Ah Beh and stated that he was looking for her husband. Ah Beh was known to PW3. On being told that her husband had gone out the two left. After they had left, PW3 then proceeded to meet her husband at a factory across the road. PW3 told her husband of the visit by the two men, one of whom was the appellant. She then went home. As she reached her gate she saw the appellant together with another man walking towards her and saying something which she did not understand. The appellant then held her shoulder with one hand and pointed a pistol at her with the other and ordered her not to shout. He also told her that it was a real pistol and asked her to call her daughter (PW4) to open the door.

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[4] At that moment, she felt weak and sat by the roadside outside the gate. The appellant's friend snatched away her gold chain and bracelet and also took the bunch of keys she had tucked to her waist. Later, she was forced into the house. She then fell onto the floor of the house near the dining area. Then the appellant sat on her whilst the other person ransacked the house.

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[5] A moment later, PW4 emerged from her room. PW3 realised that the appellant also saw PW4 and that was when she heard a gun shot, and heard PW4's shout in pain, and at that moment,

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- A the man who was ransacking the room came out and dragged PW4 to PW3's bedroom. With the permission of the appellant, PW3 went to her bedroom and saw PW4 in her bathroom. As soon as she entered the bathroom, the appellant ordered her not to shout and soon thereafter both of them left the scene.
- B the appellant was arrested in Thailand and brought back to Malaysia on 14 October 2001. The other person is still at large.

- C [6] At the trial before the High Court, the appellant gave evidence on oath. He denied that on the day and time in question, he had been to the PW3's house. He also denied knowing her. His defence was a mere denial. Consequently, the learned High Court judge found the appellant guilty and convicted him on the offence charged.

- D [7] In dismissing the appeal the Court of Appeal ruled, amongst other things, that it was the appellant who held the pistol; it was his accomplice who committed the robbery and it was the appellant who discharged the firearm, and agreed with the trial judge that there was abundant evidence to establish the appellant's guilt, and held that his conviction was entirely safe.
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Appeal To This Court

- F [8] Before us, learned counsel for the appellant argued substantially on one issue that the courts below had erred in law when they linked the act of the robbery (which was not committed by the appellant) to the appellant, notwithstanding that the appellant was not charged for the offence in furtherance of a common intention under s. 34 of the PC, and therefore, the appellant's conviction was against the weight of the evidence.

- G [9] Having heard the submissions advanced and read the authorities submitted by both parties, we found merit in the appeal.

- H [10] Before we give our reasons, it is perhaps necessary to be mindful of s. 3 of the Act which states as follows:

- I Any person who **at the time of his committing** or attempting to commit or abetting the commission of a scheduled offence discharges a firearm with intent to cause death or hurt to any person, shall, notwithstanding that no hurt is caused thereby, be punished with death. (emphasis added)

[11] And “robbery” is one of the scheduled offences enumerated in the Schedule to the Act. A

[12] What the prosecution had to prove for the offence under s. 3 against the appellant were:

- (i) that there was a robbery committed by the appellant; B
- (ii) that the appellant at the time of his committing the robbery discharged a firearm; and
- (iii) that the appellant intended to cause death or hurt to some person. C

Be it noted that even if no hurt was caused by the discharge of the firearm, it is of no consequence to the offence.

[13] The wordings of s. 3 of the Act, in particular, “any person who at the time of his committing ... a scheduled offence discharges a firearm” clearly means that the prosecution must prove that it was the appellant who committed the act of robbery and had discharged a firearm whilst committing the offence. Jeffrey Tan JC (as he then was) in *Public Prosecutor v. Ong Poh Cheng* [1996] 1 CLJ 501 had the opportunity to interpret the phrase “at the time of his committing” at p. 510: D

That s. 3 is a penal provision is beyond any argument, and its meaning, giving it a strict interpretation, as is the rule, to penal provisions, must therefore be narrowly construed. The natural meaning of the words ‘**at the time of his committing** the offence’ emphasizes the time of the commission of the offence and specifies the discharge of a firearm before the completion of a scheduled offence. The choice in the language – the present participle – was deliberate and reflected the legislature’s intention to have severely punished the commission of a scheduled offence, but only if a firearm was discharged during but not after the offence. (emphasis added) F G

In our judgment, the learned judicial commissioner’s interpretation of the phrase is correct. It may be noted that Ong Poh Cheng’s case went on appeal to the Court of Appeal and the High Court’s decision was upheld (see [1998] 4 CLJ 1) and a further appeal to the Federal Court (Wan Adnan CJ (Malaya), Dr. Zakaria Yatim FCJ, Chan Nyarn Hoi JCA) was dismissed *vide* Mahkamah H I

- A Persekutuan Rayuan Jenayah No. 05-9-98 (P) dated 24 November 1998. However, there was no written judgment of the Federal Court.

- B [14] It is worthy of note that the appellant was never charged for committing the offence in furtherance of a common intention under s. 34 of the PC with another person who was and is still at large. In *Lee Kwai Heong & Anor v. Public Prosecutor* [2006] 1 CLJ 1043, the Court of Appeal (Richard Malanjum JCA, Augustine Paul JCA, Hashim Yusoff JCA (as they were then)) reiterated the principle of s. 34 of the PC set forth in *Sabarudin Non v. PP & Other Appeals* [2005] 1 CLJ 466 where Gopal Sri Ram JCA, in delivering the judgment of the Court of Appeal, said at pp. 482-483:

- D To deal with the criminal liability of the second and third accused, it is necessary first to quote from two recent authorities to remind ourselves of the law governing s. 34. In *Suresh v. State of Uttar Pradesh* AIR [2001] SC 1344, Sethi J speaking for himself and Agrawal J said:

- E *Section 34 of the Indian Penal Code recognises the principle of vicarious liability in the criminal jurisprudence. It makes a person liable for action of an offence not committed by him but by another person with whom he shared the common intention. It is a rule of evidence and does not create a substantive offence. The section gives statutory recognition to the common sense principle that if more than two persons intentionally do a thing jointly, it is just the same as if each of them had done it individually. There is no gain saying that a common intention pre-supposes prior concert, which requires a pre-arranged plan of the accused participating in an offence. Such a pre-concert or pre-planning may develop on the spot or during the course of commission of the offence but the crucial test is that such plan must precede the act constituting an offence. Common intention can be formed previously or in the course of occurrence and on a spur of moment. The existence of a common intention is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of the case. (emphasis added).*

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In *Hari Ram v. State of Uttar Pradesh* [2004] 3 LRI 523 (SC) which was decided by the Indian Supreme Court in August 2004, Arijit Pasayat J said:

Under the provisions of s. 34 the essence of the liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. As a result of the application of principles enunciated in s. 34, when an accused is convicted under s. 302 read with s. 34, in law it means that the accused is liable for the act which caused death of the deceased in the same manner as if it was done by him alone. The provision is intended to meet a case in which it may be difficult to distinguish between acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them. As was observed in *Ch Pulla Reddy & Ors v. State of Andhra Pradesh* AIR [1993] SC 1899, s. 34 is applicable even if no injury has been caused by the particular accused himself. For applying s. 34 it is not necessary to show some overt act on the part of the accused.

[15] It is therefore important in our case for the prosecution to frame the charge with reference to s. 34 of the PC. The provision is intended to make a person liable for the action of an offence not committed by him but by another person with whom he shared the common intention. By invoking s. 34, it means that the appellant was equally liable for the act of robbery in the same manner as if the act were done by him alone, notwithstanding that it was the other person who actually committed the offence.

[16] But in the present case, the appellant was charged alone for discharging a firearm in the commission of the robbery. On the facts, it was the other person and not the appellant who committed the robbery. He had snatched away PW3's gold chain and bracelet when she was sitting by the roadside outside the gate of her house. The offence of robbery was committed and completed outside the house during which time no firearm was discharged by the appellant. The appellant shot at PW4 whilst they were in the house. Since the prosecution did not invoke s. 34 of the PC, it is incumbent upon the prosecution to prove that the appellant did commit the act of robbery and not the other person. From the evidence, there was nothing to suggest

- A that the appellant had taken anything from PW3 or in the house. In fact the finding of fact by the High Court, which was subsequently affirmed by the Court of Appeal, *vis-a-vis* the act of robbery, clearly showed that the said act of robbery was not committed by the appellant. Hence, the first two vital ingredients
- B of the offence, that the robbery was committed by the appellant and that the appellant at the time of his committing the robbery discharged a firearm, were not proved against the appellant. The charge against the appellant could not stand. We agreed with the
- C appellant that the conviction was against the weight of the evidence.

- [17] Therefore, the conviction under s. 3 of the Act could not be sustained as the prosecution had failed to prove that the appellant had committed the robbery when he discharged the
- D firearm. Accordingly, we allowed the appeal and set aside the conviction and sentence imposed. However, we found there was ample evidence on record to show that it was the appellant who voluntarily caused hurt to PW4 by means of a firearm, an instrument for shooting. The injury suffered by PW4 was described
- E by the orthopaedic surgeon (PW5) as “a through and through gun-shot wound in the upper part of her thigh”. And this hurt clearly endangered her life. By virtue of s. 167 of the Criminal Procedure Code, we found the appellant guilty and convicted him
- F under s. 326 of the PC for voluntarily causing grievous hurt to PW4. After hearing his mitigation, we sentenced him to 18 years imprisonment to run from the date of his arrest.

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